SUPREME COURT, U.S.
FILED
OCT 7 1932
CHARLES ELMORE CROPLEY
CLERK

FILE COPY

NO. 356

In the Supreme Court of the United States

OCTOBER TERM, 1932

INDIAN TERRITORY ILLUMINATING OIL COMPANY,
a Corporation,
Appellant,

vs.

BOARD OF EQUALIZATION OF TULSA COUNTY,
OKLAHOMA,
Appellee.

ON APPEAL FROM THE SUPREME COURT
OF THE STATE OF OKLAHOMA

STATEMENT AS TO JURISDICTION ON APPEAL

JOHN H. MILEY,
Counsel for Appellant.

Utterback Typesetting Co., Oklahoma City

NO. 356

In the Supreme Court of the United States

OCTOBER TERM, 1932

INDIAN TERRITORY ILLUMINATING OIL COMPANY,
a Corporation,
Appellant,

vs.

BOARD OF EQUALIZATION OF TULSA COUNTY,
OKLAHOMA,
Appellee.

STATEMENT AS TO JURISDICTION ON APPEAL

May It Please the Court:

The appellant, in support of the jurisdiction of this Court to review the above entitled cause on appeal, respectfully represents:

A.

STATUTORY PROVISIONS BELIEVED TO SUSTAIN THE JURISDICTION

The Act of February 13, 1925, Chapter 229, Section 1, 43 Stat. at L. 936, 937 (United States Code, Title 28, Section 344), provides that Section 237 of the Judicial Code is amended to read in part as follows:

> "Sec. 237 (a) A final judgment or decree in any suit in the highest court of a State in which a decision in the suit could be had, where is drawn in question the

validity of a treaty or statute of the United States, and the decision is against its validity; or where is drawn, in question the validity of a statute of any State, on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, and the decision is in favor of its validity, may be reviewed by the Supreme Court upon a writ of error. The writ shall have the same effect as if the judgment or decree had been rendered or passed in a court of the United States. The Supreme Court may reverse, modify, or affirm the judgment or decree of such State court, and may, in its discretion, award execution or remand the cause to the court from which it was removed by the writ."

The Act of January 31, 1928, C. 14, Sec. 1, 45 Stat. 54, entitled "An Act in Reference to Writs of Error," provides:

> "The writ of error in cases, civil and criminal, is abolished. All relief which heretofore could be obtained by writ of error shall hereafter be obtainable by appeal."

The Act of April 26, 1928, C. 440, 45 Stat. 466, amending the Act of January 31, 1928, C. 14, Sec. 2, 45 Stat. 54, provides:

> "The statutes regulating the right to a writ of error, defining the relief which may be had thereon and prescribing the mode of exercising that right and of invoking such relief, including the provisions relating to courts, supersedeas and mandate, shall be applicable to the appeal which the preceding section substitutes for a writ of error."

B.

DATE OF JUDGMENT AND DATE OF APPLICATION FOR APPEAL

The judgment sought to be reviewed was entered on the 17th day of May, 1932 (R. 65, 66).*

The application for appeal was presented on the 12th day of August, 1932 (R. 12).

C.

NATURE OF CASE AND RULING BELOW

The question involved in this case is whether 51,630 barrels of crude oil of the value of $51,081.00, located in certain tanks in Tulsa County, State of Oklahoma, on January 1, 1929, were subject to assessment for ad valorem taxation by the taxing agencies of the State of Oklahoma and the municipalities thereof, for the year 1929 (R. 31).

The oil in question was produced by the appellant, prior to January 1, 1929, from lands located in Seminole County, Oklahoma, owned by Seminole allottees, members of the Seminole tribe of Indians, as their individual allotments, from which restrictions against alienation imposed by Acts of Congress had not been removed (R. 32-44). The oil was produced by appellant under and pursuant to leases executed by the several allottees and approved by the Secretary

*All references to the record are to pages of the certified unprinted record prepared by the Clerk of the Supreme Court of Oklahoma and on file with the Clerk of this Court. The record has not yet been printed.

of the Interior pursuant to the authority of the Act of Congress approved May 27, 1928 (35 Stat. L. 312), (R. 34 to 46). The said oil so produced, together with other oil, was immediately after production piped into the storage tanks where it has since remained in its original state. The said oil so produced by the appellant had not been disposed of by it from the time of the production thereof until and throughout the entire tax period in question (R. 33).

The assessing officers of the State of Oklahoma claim that such oil is subject to assessment for ad valorem taxation for the support of state government and the several political subdivisions thereof for the year 1929, by virtue of certain statutes of the State of Oklahoma, particularly, to-wit: Sec. 9814, Compiled Oklahoma Statutes, 1921, which imposes a gross production tax upon crude oil at the time of production, in lieu of any other tax thereon for the year in which it is produced, but which provides that:

> "* * * oil in storage * * * produced and on hand at the date as of which property is assessed for general and ad valorem taxation for any subsequent tax year shall be assessed and taxed as other property within the taxing district in which such property is situated at the time."

Sec. 9627, C. O. S., 1921, provides that:

> "It shall be the duty of the * * * assessor * * * in which tanks * * * for storage of crude petroleum are located to assess as other property is assessed to the proper owners at the fair cash value, as hereinbefore defined, any and all such tanks and contents thereof."

And Sec. 9666, C. O. S., 1921, as amended by Ch. 209, Session Laws, Oklahoma, 1927, p. 258, provides:

> "The County Assessor shall on the 15th day of January of each year, proceed to take a list of all taxable property in the county and assess the value thereof as of January first * * *."

It is the contention of the appellant that such statutes of the State of Oklahoma and other provisions of Ch. 84, C. O. S., 1921, relating to Revenue and Taxation, providing for the assessment, levy, and collection by the State of Oklahoma and political subdivisions thereof of an ad valorem tax on all property situated in the State of Oklahoma are invalid when applied to the crude oil in question, because repugnant to the Constitution, treaties, and laws of the United States, in that the appellant is an agency or instrumentality employed by the Government of the United States for the development and use of the restricted land of its Indian wards for their benefit. (*Jaybird Mining Co.* v. *Weir,* 271 U. S. 609; *Gillespie* v. *Oklahoma,* 257 U. S. 501; *Indian Territory Illuminating Oil Co.* v. *Oklahoma,* 240 U. S. 522; *Large Oil Co.* v. *Howard,* 248 U. S. 549; *Howard* v. *Oil Companies,* 247 U. S. 503; *Choctaw O. & G. R. Co.* v. *Harrison,* 235 U. S. 292; *McCullouch* v. *Maryland,* 4 Wheat 316).

The validity of the statutes of the State, as applied to the oil in question on the ground aforesaid, was drawn in question at the inception of the proceeding and maintained

throughout, and the final decision of the Supreme Court of the State of Oklahoma, from which decision this appeal was taken, was in favor of the validity of the Statute as so applied.

The appellant, in listing its taxable property with the County Assessor, claimed that notwithstanding said State statutes, the said oil was not subject to taxation under the Constitution, laws and treaties of the United States (30 Stat. L. 567; 34 Stat. L. 137; 35 Stat. L. 312; 45 Stat. L. 495 and 34 Stat. L. 267), which claim was denied and the said property ordered listed for assessment for ad valorem taxation for said year (R. 31).

Thereupon the appellant, as provided by the laws of the State of Oklahoma, appeared before the Board of Equalization of Tulsa County, Oklahoma, to show cause why the said oil should not be so assessed, which board overruled the claim and protest, and directed that said oil be added to the assessment roll for said year as assessable and taxable property of appellant (R. 22, 27, 32).

Thereupon, as provided by the laws of the State, the appellant appealed to the District Court of Tulsa County, Oklahoma (R. 24).

The said District Court, upon regular hearing, rendered judgment in favor of appellant (R. 48-50), sustaining its claim aforesaid, and directed that the assessment be

canceled and the said property stricken from the tax rolls for said year (R. 49).

From said judgment the appellee herein, as provided by the laws of the State, appealed to the Supreme Court of the State of Oklahoma.

The Supreme Court of the State of Oklahoma, upon hearing, rendered its final decision May 17, 1932 (R. 65), denying the contention of appellant, and rendered judgment that said property be restored to the tax rolls and assessed for ad valorem taxation for said year. In the concluding paragraph of the opinion of the Supreme Court (R. 66-71) it was stated:

> "The trial court erred in holding that the property herein sought to be taxed was not subject to ad valorem taxation. The judgment of that court is reversed and the cause is remanded to it with directions to render judgment in accordance herewith."

As allowed by the rules of said Supreme Court, the appellant filed a petition for re-hearing therein on May 28, 1932 (R. 72), which was denied by order entered on June 7, 1932 (R. 74).

The Supreme Court is the highest Court of the State of Oklahoma in which a decision of the suit can be had, and its decision and judgment aforesaid is final.

D.

CASES BELIEVED TO SUSTAIN JURISDICTION

The following decisions of this Court are believed to sustain jurisdiction of this appeal:

Jaybird Mining Company v. *Weir*, 271 U. S. 609.

Gillespie v. *State of Oklahoma*, 257 U. S. 501.

Dahnke-Walker Milling Co. v. *Bondurant*, 257 U. S. 282.

We respectfully submit that this Court has jurisdiction of this appeal.

Respectfully submitted.

JOHN H. MILEY,
Counsel for Appellant.

FILE COPY

Office Supreme Court, U.S.
FILED
NOV 22 1932
CHARLES ELMORE CROPLEY
CLERK

NO. 356

In the Supreme Court of the United States

OCTOBER TERM, 1932.

INDIAN TERRITORY ILLUMINATING OIL COMPANY, a Corporation,
Appellant,

vs.

BOARD OF EQUALIZATION OF TULSA COUNTY, OKLAHOMA,
Appellee.

ON PETITION FOR WRIT OF CERTIORARI

BRIEF IN SUPPORT OF PAPERS WHEREON APPEAL WAS ALLOWED AS PETITION FOR WRIT OF CERTIORARI

JOHN H. MILEY,
Counsel for Petitioner.

Utterback Typesetting Co., Oklahoma City

SUBJECT INDEX

		Page
I.	The Opinions of the Courts Below	1
II.	Jurisdiction	2
III.	Statement of the Case	10
IV.	Specification of Errors	13
V.	Argument	17
	Summary of Argument	16
	Point A. The State Supreme Court has decided a Federal question of substance in a way not in accord with the applicable decisions of this Court	16
	Point B. The lessee of restricted Seminole land for oil and gas mining purposes, under a lease executed pursuant to Sec. 2 of the Act of May 27, 1908 (Ch. 199, 35 Stat. L. 312), with the approval of the Secretary of the Interior, is an agency or instrumentality of the Government of the United States. The lessee's share of the product as specified in the lease, as well as that of the Indian ward, produced from such land by virtue of the lease and under the supervision of the Secretary of the Interior is not subject to taxation by the state while held in storage in its original form prior to sale thereof by the lessee	16

TABLE OF CASES CITED

Apponoose County v. Henke, 207 Iowa 835 34
Board of County Commissioners of Payne County v. Indian Territory Illuminating Oil Co., 14 Pac. (2d) 929 23
Board of Equalization of Tulsa County v. Indian Territory Illuminating Oil Co., 13 Pac. (2d) 585 1
Choctaw O. & G. R. Co. v. Harrison, 235 U. S. 292 ..... 6, 16, 18, 23
Citizens Nat. Bank of Cincinnati v. Durr, 257 U. S. 99 10
Colley v. H. L. Edwards Co., 258 S. W. 191 34
Dahnke-Walker Mill Co. v. Bondurant, 257 U. S. 282 9
Dana v. Dana, 250 U. S. 220 10
Edgewood Distilling Co. v. Rosser's Admr., 116 Va. 624 34
First National Bank of Cushing v. Funnell, 144 Okla. 188 34
Gillespie v. Oklahoma, 257 U. S. 501 ..... 5, 9, 16, 25
Harrington v. United States, 11 Wall. 356 34
Holmes v. Marshall, 145 Ca. 777 34
Howard v. Oil Companies, 247 U. S. 503 ..... 5, 16, 22

Page

Indian Territory Illuminating Oil Co. v. Oklahoma, 240 U. S. 522...5, 16, 18, 23
In re Skelton Lead & Zinc Co's Gross Production Tax, 81 Okla. 134..... 24
Jaybird Mining Co. v. Weir, 271 U. S. 609.....5, 8, 16, 31
Large Oil Co. v. Howard, 248 U. S. 549.....5, 16, 22, 23
McAlester-Edwards Coal Co. v. Trapp, 43 Okla. 510..... 18
McCulloch v. Maryland, 4 Wheat 316.....6, 16
Shaffer v. Carter, 252 U. S. 37..... 24
State v. Northwestern Elevator Co., 101 Minn. 192..... 34
United Express Co. v. Minnesota, 233 U. S. 335..... 20

Table of Statutes Cited

Act of April 26, 1906, Chap. 1876 (34 Stat. 137)..... 6
Act of June 16, 1906, Chap. 3335 (34 Stat. 267)..... 6
Act of June 28, 1898, Chap. 517 (30 Stat. 567)..... 6
Act of May 27, 1908, Chap. 199 (35 Stat. 312).....4, 6, 16
Act of May 10, 1928, Chap. 517 (45 Stat. 495)..... 6
Compiled Oklahoma Statutes 1921, Chap. 84.....6, 14
Section 9627 .....5, 14
Section 9666, as amended by Ch. 209, Session Laws of Oklahoma, 1927, p. 258.....5, 14
Section 9814 .....5, 14, 20
Sec. 237 (b) (c) of the Judicial Code, as amended by the Act of February 14, 1925, 43 Stat. 937.....2, 9
Session Laws Oklahoma, 1916, Chap. 39, p. 102..... 20

NO. 356

In the Supreme Court of the United States

OCTOBER TERM, 1932.

INDIAN TERRITORY ILLUMINATING OIL COMPANY, a Corporation,
Appellant,

vs.

BOARD OF EQUALIZATION OF TULSA COUNTY, OKLAHOMA,
Appellee.

ON PETITION FOR WRIT OF CERTIORARI

BRIEF IN SUPPORT OF PAPERS WHEREON APPEAL WAS ALLOWED AS PETITION FOR WRIT OF CERTIORARI

I.

The Opinions of the Courts Below

The opinions of the courts below have not yet been officially reported. The opinion in the Supreme Court (the highest court of the state) is unofficially reported in *Board of Equalization of Tulsa County* v. *Indian Territory Illuminating Oil Co.*, 13 Pac. Rep. (2nd Series) 585. The opinion is dated May 17, 1932, and appears in the record (R. 66)*.

*All references to the record are to pages of the certified unprinted record prepared by the Clerk of the Supreme Court of Oklahoma and on file in this Court. The record had not been printed at the time this brief was prepared.

II.

Jurisdiction

1. The statutory provisions believed to sustain the jurisdiction are Sec. 237 (b) (c) of the Judicial Code as amended by the Act of February 13, 1925, 43 Stat. L. 937 (Sec. 344 U. S. C. A.), which read in part as follows (italics supplied to indicate provisions particularly applicable):

> "Sec. 237 (b) It shall be competent for the Supreme Court, by certiorari, to require that there be certified to it for review and determination, with the same power and authority and with like effect as if brought up by writ of error (now appeal, Act of Jan. 31, 1928, C. 14, Sec. 1, 45 Stat. 54) any cause wherein a final judgment or decree has been rendered or passed by the highest court of a state in which a decision could be had where is drawn in question the validity of a treaty or statute of the United States; *or where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties, or laws of the United States; or where any title, right, privilege, or immunity is specially set up or claimed by either party under the Constitution, or any treaty or statute of, or commission held or authority exercised under, the United States;* and the power to review under this paragraph may be exercised as well where the Federal claim is sustained as where it is denied. Nothing in this paragraph shall be construed to limit or detract from the right to review on a writ of error (now appeal) in a case where such a right is conferred by the preceding paragraph; *nor shall the fact that a review on a writ of error* (now appeal) *might be obtained under the preceding paragraph be an obstacle to granting a review on certiorari under this paragraph.*

"(c) If a writ of error (now appeal) be improvidently sought and allowed under this section in a case where the proper mode of invoking a review is by petition for certiorari, this alone shall not be a ground for dismissal; but the papers whereon the writ of error (now appeal) was allowed shall be regarded and acted on as a petition for certiorari and as if duly presented to the Supreme Court at the time they were presented to the court or judge by whom the writ of error (now appeal) was allowed* * *."

2. The date of the judgment and decree to be reviewed is May 17, 1932 (R. 65), pursuant to the opinion of the court filed the same day (R. 66). Petition for rehearing was duly filed (R. 72) and denied June 7, 1932 (R. 74). The petition for appeal to this Court (R. 2) accompanied by assignment of errors and prayer for reversal (R. 7) was presented to the Chief Justice of the Supreme Court of Oklahoma on the 12th day of August, 1932, and appeal was allowed by him on that date (R. 12). Appeal bond was presented and approved on August 12, 1932 (R. 14). Citation was issued on the 12th day of August, 1932, and service acknowledged August 16, 1932 (R. 1). The transcript of the record of the Supreme Court, including all the appeal papers, was lodged in the office of the clerk of this Court on September 8, 1932.

3. The nature of the case and ruling below are as follows:

The question involved in this case is whether 51,630 barrels of crude oil of the value of $50,081.10, located in certain tanks in Tulsa County, State of Oklahoma, on Jan-

uary 1, 1929, were subject to assessment for ad valorem taxation by the taxing agencies of the State of Oklahoma and the municipalities thereof, for the year 1929 (R. 31).

The oil in question was produced by the petitioner (appellant), prior to January 1, 1929, from lands located in Seminole County, Oklahoma, owned by Seminole allottees, members of the Seminole tribe of Indians, as their individual allotments, from which restrictions against alienation imposed by Acts of Congress had not been removed (R. 32-44). The oil was produced by petitioner (appellant) under and pursuant to leases executed by the several allottees and approved by the Secretary of the Interior pursuant to the authority of the Act of Congress approved May 27, 1928 (35 Stat. L. 312), (R. 34 to 46), which provided for a division of the oil produced, of 12½ per cent to the Indian ward and the remainder to the lessee. The said oil so produced, together with other oil, was immediately after production piped into the storage tanks where it has since remained in its original state. The said oil so produced by the petitioner (appellant) had not been disposed of by it from the time of the production thereof until and throughout the entire tax period in question (R. 33).

The assessing officers of the State of Oklahoma claim that such oil is subject to assessment for ad valorem taxation for the support of state government and the several political subdivisions thereof for the year 1929, by virtue of certain statutes of the State of Oklahoma, particularly,

to-wit: Sec. 9814, Compiled Oklahoma Statutes 1921, which imposes a gross production tax upon crude oil at the time of production, in lieu of any other tax thereon for the year in which it is produced, but which further provides that:

> "* * * oil in storage * * * produced and on hand at the date as of which property is assessed for general and ad valorem taxation for any subsequent tax year shall be assessed and taxed as other property within the taxing district in which such property is situated at the time."

Sec. 9627, C. O. S. 1921, provides that:

> "It shall be the duty of the * * * assessor * * * in which tanks * * * for storage of crude petroleum are located to assess as other property is assessed to the proper owners at the fair cash value, as hereinbefore defined, any and all such tanks and contents thereof."

And Sec. 9666, C. O. S. 1921, as amended by Ch. 209, Session Laws, Oklahoma 1927, p. 258, provides:

> "The County Assessor shall on the 15th of January of each year, proceed to take a list of all taxable property in the county and assess the value thereof as of January first * * *."

It is the contention of petitioner (appellant) that it is an agency or instrumentality employed by the Government of the United States for the development and use of the restricted land of its Indian wards for their benefit (*Jaybird Mining Co.* v. *Weir*, 271 U. S. 609; *Gillespie* v. *Oklahoma*, 257 U. S. 501; *Indian Territory Illuminating Oil Co.* v. *Oklahoma*, 240 U. S. 522; *Large Oil Co.* v. *Howard*, 248 U. S. 549; *Howard* v. *Oil Companies*, 247 U. S. 503; *Choctaw O.*

& G. R. Co. v. *Harrison,* 235 U. S. 292; *McCulloch* v. *Maryland,* 4 Wheat 316), and it is immune from taxation on such oil so produced and held in storage in its original state; and that such statutes of the State of Oklahoma and other provisions of Ch. 84, C. O. S. 1921, relating to revenue and taxation, providing for the assessment, levy, and collection by the State of Oklahoma and political subdivisions thereof of an ad valorem tax on all property situated in the State of Oklahoma are invalid when applied to the crude oil in question, because repugnant to the Constitution, treaties, and laws of the United States.

The immunity from taxation and the validity of the statutes of the State, as applied to the oil in question on the ground aforesaid, was drawn in question at the inception of the proceeding and maintained throughout, and the final decision of the Supreme Court of the State of Oklahoma, which is here sought to be reviewed, was against such immunity from taxation and in favor of the validity of the statutes as so applied.

The petitioner (appellant), in listing its taxable property with the county assessor, claimed that notwithstanding said State statutes, the said oil was not subject to taxation under the Constitution, laws and treaties of the United States (30 Stat. L. 567; 34 Stat. L. 137; 35 Stat. L. 312; 45 Stat. L. 495 and 34 Stat. L. 267), which claim was denied and the said property ordered listed for assessment for ad valorem taxation for said year (R. 31).

Thereupon the petitioner (appellant), as provided by the laws of the State of Oklahoma, appeared before the Board of Equalization of Tulsa County, Oklahoma, to show cause why the said oil should not be so assessed, which board overruled the claim and protest and directed that said oil be added to the assessment roll for said year as assessible and taxable property of appellant (R. 22, 27, 32).

Thereupon, as provided by the laws of the State, the appellant appealed to the District Court of Tulsa County, Oklahoma (R. 24).

The said district court, upon regular hearing, rendered judgment in favor of petitioner (appellant) (R. 48-50), sustaining its claim aforesaid, and directed that the assessment be canceled and the said property stricken from the tax rolls for said year (R. 49).

From said judgment the respondent (appellee) herein, as provided by the laws of the State, appealed to the Supreme Court of the State of Oklahoma.

The Supreme Court of the State of Oklahoma, upon hearing, rendered its final decision May 17, 1932 (R. 65), denying the contention of appellant, and rendered judgment that said property be restored to the tax rolls and assessed for ad valorem taxation for said year. In the concluding paragraph of the opinion of the Supreme Court (R. 66-71) it was stated:

"The trial court erred in holding that the property herein sought to be taxed was not subject to ad valorem taxation. The judgment of that court is reversed and the cause is remanded to it with directions to render judgment in accordance herewith."

The Supreme Court is the highest court of the State of Oklahoma in which a decision of the suit can be had, and its decision and judgment aforesaid is final.

4. Counsel for petitioner was of the opinion that the question of the proper mode to invoke the jurisdiction to secure a review of the case had been definitely settled and was ruled by *Jaybird Mining Co.* v. *Weir,* 271 U. S. 609, which involved the validity of an ad valorem tax assessed by the officials of the State under the same State statutes here involved, upon the product of the restricted land of an Indian pursuant to a lease executed by the Indian with the approval of the Secretary of the Interior. In that case this Court said in concluding the opinion:

"In this case the lease was made to secure the development of the lands and obtain for the benefit of the restricted Indian owners a percentage of the gross proceeds of the ores to be mined. The ad valorem tax here in controversy was assessed on the ores in mass at the mine before sale, and that was an attempt to tax an agency of the Federal Government within the principle of the cases cited.

"From abundance of caution the company presented a petition for a writ of certiorari; *but, as a writ of error lies* (now appeal) the petition will be denied. *Gillespie* v. *Oklahoma, supra,* 506 (66 L. ed. 341, 42 Sup. Ct. Rep. 171)."

The *Gillespie Case*, 257 U. S. 506, cited in the foregoing, involved the validity of a state tax upon the net income derived by a lessee of restricted Indian lands obtained from his share of the sale of oil and gas under such leases. The Supreme Court of the State had sustained the validity of the tax, and in reversing the decision on the ground that such income of an instrumentality of the United States was not subject to the tax, this Court concluded its opinion as follows:

> "*As a writ of error* (now appeal) *lies in this case*, the petition for certiorari that was presented for greater caution will be denied. *Dahnke-Walker Mill Co.* v. *Bondurant*, December 12, 1921" (257 U. S. 282.)

In *Dahnke-Walker Mill Co.* v. *Bondurant*, 257 U. S. 282, this Court considered the question at length, and held that a case was rightfully brought to this Court by writ of error (now appeal) where the state court applied and enforced to appellant's disadvantage a state statute (otherwise valid) which the appellant seasonably insisted as so applied and enforced was repugnant to the Constitution.

Since it now appears from the memorandum entered November 7, 1932, dismissing the appeal herein, that counsel has misinterpreted these decisions, it is respectfully submitted that although the validity of the state statutes under which the tax was imposed and sustained was not drawn in question, in their entirety, the jurisdiction to review by certiorari is conferred by that portion of Sec. 237 (b) as follows:

"• • • or where any title, right, privilege, or immunity is specially set up or claimed by either party under the Constitution, or any treaty, or statute of, or commission held or authority exercised under, the United States."

In the following cases involving claims of immunity from state taxation on Federal grounds, it was held that review might be had by certiorari:

Citizens Nat. Bank of Cincinnati v. *Durr,* 257 U. S. 99.

Dana v. *Dana,* 250 U. S. 220.

III.

Statement of the Case

This case in the court below involved the claim of the petitioner (appellant) that certain of its property sought to be assessed by the tax officials of the State of Oklahoma was exempt from assessment for ad valorem taxation for the year 1929, viz: (a) four 53,000 bbl steel tanks of the value of $22,000, and (b) 51,630 bbls of crude oil of the value of $50,081.10.

The claim of exemption with respect to the four steel tanks was based upon the construction of certain statutes of the State. The decision of the Supreme Court of the State of Oklahoma that such tanks were not so exempt is of course final and is not subject to review by this Court since no Federal question is involved. In fact it was conceded in the Supreme Court that under an earlier decision

which had been overlooked and was not called to the attention of the district court, that court erred in holding that the four tanks were not subject to taxation.

The claim of exemption with reference to the 51,630 barrels of crude oil does involve a Federal question, and it is in respect to that portion of the decision affecting this property that a review by this Court is sought.

The proceedings and claims with respect to the 51,630 barrels of crude oil were as follows:

The petitioner did not include this oil in its return to the county assessor of Tulsa County, of property in that county subject to assessment for the year 1929.

The County Board of Equalization served notice on the petitioner to show cause before it on June 5, 1929, why said property should not be listed and assessed.

The petitioner appeared and protested and objected to such listing and assessment, saying:

> "That the item of 51,630 barrels of crude oil in storage, of 38.2 gravity, produced from lands owned by restricted Indians, of the assessed value of $50,081.10, is not subject to ad valorem taxation in said county, for the reasons:
>
> "(a) That Indian Territory Illuminating Oil Company, in the producing of said oil, was operating as a governmental instrumentality, and under the Acts of Congress and the decisions of the United States Supreme Court, said product so produced, is not taxable by the State of Oklahoma, or any of its political or municipal subdivisions.

"(b) That said oil constitutes, as to Indian Territory Illuminating Oil Company, income derived from a restricted source, and as such income, under the Acts of Congress and the decisions of the United States Supreme Court, such property is not taxable by the State of Oklahoma, or any of its political or municipal subdivisions" (R. 25-26).

The protest and objection was overruled, and the board ordered that the 51,630 barrels of crude oil be listed as property subject to ad valorem taxation, and that it be assessed at the valuation of $50,081.10 (R. 22-23-24).

The petitioner then appealed to the District Court of Tulsa County, Oklahoma (R. 24-27).

At the trial in that court the facts were stipulated by the parties (R. 30-46).

The facts so stipulated are briefly summarized in the opinion of the State Supreme Court as follows:

"It was stipulated that the steel storage tanks were owned by the defendant; that they were situated in Tulsa County; that they were not situated upon any restricted Indian land or leasehold estate; that they were not situated upon the land from which any of the oil sought to be taxed was produced; that the oil sought to be taxed was produced from lands in Seminole County, which was owned by restricted Indians; that the oil was produced between the dates of March 31 and June 16, 1927; that the oil was run through a pipe line from the place of production to the storage tanks in Tulsa County, and that the oil sought to be taxed was commingled with oil from unrestricted land" (R. 67).

A copy of one of the leases on the restricted Indian

lands, approved by the Secretary of the Interior, from which the 51,630 barrels of oil in question was produced, is shown in the record (R. 34-46). The leases are in substantially the same form involved in the previous decisions of this Court hereafter referred to.

The state district court rendered its judgment sustaining the claim aforesaid, that the 11,630 barrels was exempt from ad valorem taxation, and ordered the same stricken from the tax rolls (R. 48-50).

The Board of Equalization of Tulsa County appealed from that judgment to the Supreme Court of the State (R. 49, 55).

The Supreme Court of the State denied the claim of exemption aforesaid, held the oil in question subject to taxation, and reversed the judgment of the district court, and directed that judgment be rendered in accordance with its views (R. 71, 65).

IV.

Specification of Errors

1. The Supreme Court of the State of Oklahoma erred in reversing the judgment of the District Court of Tulsa County, Oklahoma, and in holding and deciding that the said District Court of Tulsa County, Oklahoma, erred in holding that the property sought to be taxed in this cause was not subject to ad valorem taxation for the year 1929,

by the State of Oklahoma, or any political subdivision thereof.

2. The Supreme Court of the State of Oklahoma erred in refusing to affirm the judgment of the District Court of Tulsa County, Oklahoma.

3. The Supreme Court of the State of Oklahoma erred in holding, deciding and determining that Section 9574, and succeeding sections of Chapter 84, Compiled Oklahoma Statutes 1921, particularly Sections 9814, 9627 and 9614, which provide for the assessment, levy and collection by the State of Oklahoma and political subdivisions thereof of an ad valorem tax on all property situated in the State of Oklahoma during any given tax year are valid when applied to crude petroleum produced from the allotment of a restricted Seminole Indian in Seminole County, Oklahoma, by a lessee under a lease executed by such restricted allottee and duly approved by the Secretary of the Interior, and while the oil so produced is still owned and held in storage in its original state and not disposed of by said lessee and in rendering a decision in favor of the validity of said statutes when applied to and construed to cover the property sought to be taxed in this cause, and in not holding under the facts in this cause that said statutes as so applied are repugnant to the Constitution, treaties and laws of the United States.

4. The Supreme Court of the State of Oklahoma erred in holding, deciding and determining that the acts of the

county assessor, the county treasurer and the Board of Equalization of Tulsa County, Oklahoma, and the authority exercised by them and each of them under and by the authority conferred and vested in them by the said statutes of the State of Oklahoma mentioned specifically in assignment number three herein and above set forth, and other statutes of the State of Oklahoma authorizing the assessment of an ad valorem tax on the property involved in this cause for the period in question are valid, and in rendering a decision in favor of their validity and in not holding said statutes and the authority so exercised by the officials aforesaid under said statutes repugnant to the Constitution, treaties and laws of the United States.

5. The Supreme Court of the State of Oklahoma erred in sustaining the above mentioned statutes of the State of Oklahoma, authorizing the assessment, levy and collection of ad valorem tax on the crude oil involved in this case, said crude oil being held in storage, unsold and in its original state throughout and during the entire tax period in question by the petitioner herein, and said crude oil having been by the petitioner produced solely under an oil and gas lease upon restricted Seminole lands under the control of Congress and the Secretary of the Interior.

6. The Supreme Court of the State of Oklahoma erred in its decision denying that the said crude oil produced by the petitioner is and was exempt from ad valorem taxation

as claimed by the petitioner under the Constitution, treaties and laws of the United States.

V.

Summary of the Argument

Point A: The State Supreme Court has decided a Federal question of substance in a way not in accord with applicable decisions of this Court, which decisions are as follows:

Jaybird Mining Co. v. *Weir*, 271 U. S. 609.

Gillespie v. *Oklahoma*, 257 U. S. 501.

Indian Territory Illuminating Oil Co. v. *Oklahoma*, 240 U. S. 522.

Large Oil Co. v. *Howard*, 248 U. S. 549.

Howard v. *Oil Companies*, 247 U. S. 503.

Choctaw O. & G. R. Co. v. *Harrison*, 235 U. S. 292.

McCulloch v. *Maryland*, 4 Wheat 316.

Point B: The lessee of restricted Seminole Indian land for oil and gas mining purposes, under a lease executed pursuant to Sec. 2 of the Act of May 27, 1908 (Ch. 199, 35 Stat. L. 312), with the approval of the Secretary of the Interior, is an agency or instrumentality of the Government of the United States. The lessee's share of the product as specified in the lease, as well as that of the Indian ward, produced from such land by virtue of the lease and under the supervision of the Secretary of the Interior is not sub-

ject to taxation by the state while held in storage in its original form, prior to sale thereof by the lessee.

ARGUMENT

The immunity from taxation claimed by petitioner on the oil in question appears to be well established by the series of decisions of this Court culminating in the Gillespie case. The application of the principles decided in that case to the property involved in the Jaybird Mining Co. case (ores mined by lessee from land of a restricted Indian under lease approved by the Secretary of the Interior) resulted in the conclusion by this Court that the same was not subject to ad valorem taxation by the state. The application to the crude oil here involved must undoubtedly result in a like conclusion.

A brief review of this series of decisions should be sufficient to demonstrate the correctness of the propositions stated in the summary.

The first of the decisions in the order of rendition is *Choctaw O. & G. R. Co.* v. *Harrison,* 235 U. S. 292. In that case there was involved the validity of a statute of the State of Oklahoma imposing a tax as applied to the appellant. The statute, approved May 27, 1908, as amended by the Act of March 27, 1909, levied a tax of ½ of 1 per centum on the gross receipts derived from coal mined and produced in the state. The act expressly provided that the tax "*shall be in*

addition to the taxes levied and collected upon an ad valorem basis upon such mining * * * property, and the appurtenances thereto belonging."

The appellant was the lessee of certain unallotted lands of the Choctaw and Chickasaw Indians for coal mining purposes, the leases having been executed by trustees pursuant to an Act of Congress. The appellant claimed that with respect to the coal mined from such lands, that it was a Federal instrumentality acting under congressional authority, and as such not liable to the tax on coal so mined. The State Supreme Court had previously, in *McAlester-Edwards Coal Co.* v. *Trapp,* 43 Okla. 510, construed the tax as one upon property (the coal after production) and not upon the privilege of mining, and hence not an unlawful burden on a federal agency or instrumentality. This Court nevertheless sustained the claim of the lessee mining company. In the opinion it was said:

> "From the foregoing it seems manifest that the agreement with the Indians imposed upon the United States a definite duty in respect to opening and operating the coal mines upon their lands, and appellant is the instrumentality through which this obligation is being carried into effect. Such an agency cannot be subjected to an occupation or privilege tax by a state. *McCullock* v. *Maryland,* 4 Wheat. 316, 425, 4 L. ed. 579, 606; *Farmers & M. Sav. Bank* v. *Minnesota,* 232 U. S. 516, 58 L. ed. 706, 34 Sup. Ct. Rep. 354."

The next case to come before this Court was *Indian Territory Illuminating Oil Co.* v. *Oklahoma,* 240 U. S. 522,

which was before this Court on writ of error to the Supreme Court of Oklahoma to review its judgment. 43 Okla. 307. The State Court had denied the claim of the appellant that as an agency or instrumentality of the Federal Government as sub-lessee under a lease of lands of the Osage Tribe of Indians for oil and gas mining purposes, granted by authority of an Act of Congress, the value of such sub-leases could not be included in determining the value of its capital stock for ad valorem taxation.

This Court, however, sustained the contention. Referring to *Choctaw O. & G. R. Co.* v. *Harrison, supra,* this Court in its opinion observed:

> "The law was held to be invalid as attempting to tax an instrumentality through which the United States was performing its duty to the Indians."

Continuing, this Court said:

> "The application of the case to that at bar needs no assisting comment. A tax upon the leases is a tax upon the power to make them, could be used to destroy the power to make them. If they cannot be taxed as entities they cannot be taxed vicariously by taxing the stock, whose only value is their value, or by taking the stock as an evidence or measure of their value, rather than by directly estimating them as the Board of Equalization and the referee did."

This Court thereupon concluded that "the assessment against the oil company, so far as it included the leases, whether as separate objects of taxation or as represented or valued by the stock of the company, is invalid."

Before the decision of this Court in *Indian Territory Illuminating Oil Co.* v. *Oklahoma, supra,* the Legislature of Oklahoma enacted Chapter 39, S. L. 1916, p. 102 (now Section 12434, Oklahoma Statutes 1931; Section 9814, Compiled Oklahoma Statutes, 1921), approved February 14, 1916. It was intended by the new Act to meet the objections to the former Act as applied to lessees operating on restricted Indian lands under authority of Congress. The new statute was based on the assumption that the *property* of a federal agency or instrumentality located in a State was subject to taxation therein. While the tax was in form a gross production tax, that is, a tax measured by the value of the oil when and as produced, it was declared to be a substitute for and in lieu of the general ad valorem tax on the taxable property of the producer. It was thought that such a tax would be sustained by this Court on the authority of *United Express Co.* v. *Minnesota,* 233 U. S. 335, wherein it was held in effect that while a State could not tax the receipts of a carrier derived from intaxable commerce as such, that a tax measured in part by such receipts, "in lieu of all taxes on its property," was valid.

The new Act, among other things, imposed a tax equal to ½ of 1 per cent of the gross value of asphalt and ores bearing lead, zinc, jack, gold, silver and copper products, and a tax equal to 3 per cent of the value of the production of petroleum or other crude or mineral oil and of natural gas, less the royalty interest, on every person, firm, associa-

tion or corporation engaged in the production within the State of such minerals and oil and gas. It was further provided in the statute:

> "The payment of the taxes herein imposed shall be in full and *in lieu of all taxes* by the State, counties, cities, towns, townships, school districts and other municipalities upon any property rights attached to or inherent in the right to said minerals, upon leases for the mining of asphalt and ores bearing lead, zinc, jack, gold, silver or copper, or for petroleum or other crude oil or other mineral oil or for natural gas upon the mining rights and privileges for the minerals aforesaid belonging or appertaining to land, upon the machinery, appliances and equipment used in and around any well producing petroleum or other crude or mineral oil or natural gas, or any mine producing asphalt, or any of the mineral ores aforesaid and actually used in the operation of such well or mine; *and also upon the oil, gas, asphalt or ores bearing minerals hereinbefore mentioned during the tax year in which the same is produced,* and upon any investment in any of the leases, rights, privileges, minerals or property hereinbefore in this paragraph mentioned or described; but any interest in the land other than that herein enumerated, and oil in storage, asphalt, and ores bearing the minerals hereinbefore named, mined, produced and on hand at the date as of which property is assessed for general and ad valorem taxation for any subsequent tax year shall be assessed and taxed as other property within the taxing district in which such property is situated at the time.
>
> "The State Board of Equalization, upon its own initiative, may, and upon complaint of any person who claims that he is taxed too great a rate hereunder, shall take testimony to determine whether the taxes herein imposed are greater or less than the general ad valorem tax for all purposes would be on the property of such producer subject to taxation in the district or

districts where the same is situated, including the value of oil, gas or mineral lease, or of the mining or mineral rights, the machinery, equipment or appliances used in the actual operation of, in and around any such well or mine, the value of the oil, gas, asphalt, or any of the said mineral ores produced and any other element of taxable value in lieu of which the tax herein is levied. The said board shall have power and it shall be its duty to raise or lower the rates herein imposed to conform thereto. An appeal may be had from the decision of the State Board of Equalization thereon, by any person aggrieved, to the Supreme Court, in like manner and with like effect as provided by law in other appeals from said Board to said court; provided, that after such tax has been collected and distributed, or paid without protest, no complaint with reference to rate thereof shall be heard or considered."

In four cases involving the tax on oil produced from restricted Indian lands under the provisions of the 1916 Act by lessees under leases of the kind involved in this case, the tax was held invalid by the District Court of the United States for the Western District of Oklahoma. The decision was affirmed by this Court in a memorandum. *Howard* v. *Oil Companies,* 247 U. S. 503.

Later the Supreme Court of the State had the same question before it in *Large Oil Co.* v. *Howard,* 63 Okla. 143, and reached the opposite conclusion.

The State Court in that case assented to the proposition (to which it has since adhered) that lessees of restricted Indian lands for oil and gas mining purposes, under leases approved by the Secretary of the Interior, are agen-

cies or instrumentalities of the Federal Government. In the opinion in that case it was said:

> "It is not open to question that the plaintiff in error and a large number of the oil producers in this State, alike situated, are to be deemed and considered in the discharge of the functions imposed upon them by the general government as a federal agent or instrumentality, through which the government discharges its duty to a considerable class of the Indians of the State, including the Osage Indians. *Choctaw, O. & G. R. Co.* v. *Harrison,* 235 U. S. 292, 35 Sup. Ct. 27, 59 L. ed. 234; *Indian Territory Illuminating Oil Co.* v. *Oklahoma,* 240 U. S. 522, 36 Sup. Ct. 453, 60 L. ed. 779."

That Court, however, asserted the proposition that the private property of such an agency owned by it and located in the State was subject to taxation therein. The gross production tax was held to be, as recited in the Act itself, a substitute for and in lieu of a general ad valorem tax on certain taxable property of the lessee, in which was included the oil for the tax year in which it was produced.

The decision in that case was reviewed by this Court on writ of error and reversed in a *per curiam* memorandum. *Large Oil Co.* v. *Howard,* 248 U. S. 549.

The inference from these *per curiam* decisions of this Court necessarily appears to be that this Court was of the opinion that not only was the lease or the value thereof as reflected in the capital stock of a corporate lessee not subject to taxation as held in *Indian Territory Illuminating Oil Co.* v. *Oklahoma, supra,* but also that the oil produced

pursuant to the lease (production is the thing that gives the principal value to the lease) was not subject to taxation by the State. This inference is made in view of the principle that a tax is not invalid because of the form, if it be in fact a substitute for and a just equivalent of a tax the State has the power to impose.

That such inference is fully justified appears from the next decision by this Court in the Gillespie case.

Following these *per curiam* decisions, the Supreme Court of the State again stated its views on the validity of the tax imposed by the 1916 Act on oil and other minerals produced by lessees as agencies or instrumentalities of the Federal Government. In the case of *In re Skelton Lead & Zinc Company's Gross Production Tax, 1919,* 81 Okla. 134, the Supreme Court of the State, in an elaborate opinion, reviewed all the authorities, and again asserted the power of the State to tax the property of such agencies and instrumentalities of the Federal Government, including "the lessee's private, personal share of mine products," and again sustained the tax, as a substitute and just equivalent for the ordinary tax upon such property.

This Court had in the meantime adopted the view that the gross production tax was a substitute for a general ad valorem tax on the property enumerated in the statute. *Shaffer* v. *Carter,* 252 U. S. 37, 57, 58.

In *State* v. *Gillespie,* 81 Okla. 103, the question was

raised as to "whether the State has power to levy a tax on incomes derived from the lessee's private personal share of oil and gas produced under departmental leases upon restricted Indian lands." Following its decision in *In re Skelton Lead & Zinc Co., supra,* the Court held that the "lessee's private share of the products from departmental leases upon restricted (Indian) lands," being subject to ad valorem taxation, that the income derived from the sale of such products was subject to taxation. If the premise that the oil was subject to ad valorem taxation had been sound, the conclusion that the proceeds of the sale of such oil was taxable as income would follow as a matter of course. That decision of the State Supreme Court was reviewed by this Court in *Gillespie* v. *State of Oklahoma,* 257 U. S. 501. In our judgment, the decision in that case affirms that which was indicated by the former *per curiam* opinion in the Howard cases; that is, that the lessee's share of the oil produced from restricted Indian lands pursuant to leases authorized by Act of Congress, is not subject to ad valorem tax by the State, and hence the gross production levied in lieu thereof in part, is invalid. For convenience, part of the opinion is here quoted, the portion believed to be particularly pertinent being italicised:

> "In *Choctaw, O. & G. R. Co.* v. *Harrison, supra,* it was held that such a lessee could not be taxed on the gross sales of coals from Choctaw and Chickasaw mines, when the tax was in addition to the taxes collected upon an ad valorem basis. In *Indian Territory Illuminating Oil Co.* v. *Oklahoma, supra,* it was held

that a similar lessee could not be taxed upon the value of an Osage oil lease. Subsequently the principle was applied *per curiam* to gross production taxes under a later statute of 1916, *without reference to the fact that the taxes, instead of being in addition to, were in lieu of, all taxes upon property rights. Howard* v. *Gypsy Oil Co.*, 247 U. S. 503, 62 L. ed. 1239, 38 Sup. Ct. Rep. 426; *Large Oil Co.* v. *Howard*, 248 U. S. 549, 63 L. ed. 416, 39 Sup. Ct. Rep. 183.

"The argument for the state is based primarily upon the cases sustaining taxes upon net income that include gains from interstate commerce (*Shaffer* v. *Carter*, 252 U. S. 37, 57, 64 L. ed. 445, 458, 40 Sup. Ct. Rep. 221; *United States Glue Co.* v. *Oak Creek*, 247 U. S. 321, 62 L. ed. 1135, 38 Sup. Ct. Rep. 499, Ann. Cas. 1918E, 748), when 'all expenses are paid and losses adjusted, and after the recipient of the income is free to use it as he chooses' (*William E. Peck & Co.* v. *Love*, 247 U. S. 165, 175, 62 L. ed. 1049, 1052, 38 Sup. Ct. Rep. 432). *It is said also that tangible property within the state is subject to taxation, and that therefore the defendant's share of oil and gas cannot escape. If the cases that we have mentioned as decided per curiam tend to oppose the state's position, on the ground that, if the property is exempt, the income from it also is exempt, it is urged that, so far as appears, the distinction between the statute of 1916, then before the court, and the statutes dealt with by the authorities cited in those cases, was overlooked.*

"We cannot assume that there was the oversight supposed. The decision in 240 U. S. 522, that such leases were not taxable, went on general principles, not on the nature of the particular statute, and in *Shaffer* v. *Carter*, 252 U. S. 37, 48, 64 L. ed. 445, 454, 40 Sup. Ct. Rep. 221, a case that adverted to the distinction relied upon, pp. 57, 58, the decisions *per curiam* were referred to as decided upon the merits. *Those decisions appear to us to have been correct.* The criterion of interference by the states with interstate commerce is one degree.

It is well understood that a certain amount of reaction upon and interference with such commerce cannot be avoided if the states are to exist and make laws. *New York, N. H. & H. R. Co.* v. *New York,* 165 U. S. 628, 41 L. ed. 853, 17 Sup. Ct. Rep. 418; *Diamond Glue Co.* v. *United States Glue Co.,* 187 U. S. 611, 616, 47 L. ed. 328, 332, 23 Sup. Ct. Rep. 206. *The rule as to instrumentalities of the United States, on the other hand, is absolute in form and at least stricter in substance. Williams* v. *Talladega,* 226 U. S. 404, 416, 417, 419, 57 L. ed. 275, 280, 281, 33 Sup. Ct. Rep. 116; *Johnson* v. *Maryland,* 254 U. S. 51, 55, 65 L. ed. 126, 128, 41 Sup. Ct. Rep. 16. 'A tax upon the leases is a tax upon the power to make them, and could be used to destroy the power to make them.' 240 U. S. 530. *The step from this to the invalidity of the tax upon income from the leases is not long.*

"In cases where the principal is absolutely immune from interference, an inquiry is allowed into the sources from which net income is derived, and if a part of it comes from such a source, the tax is *pro tanto* void (*Pollock* v. *Farmers Loan & T. Co.,* 157 U. S. 429, 39 L. ed. 759, 15 Sup. Ct. Rep. 673, 158 U. S. 601, 39 L. ed. 1108, 15 Sup. Ct. Rep. 912)—a rule lately illustrated by *Evans* v. *Gore,* 253 U. S. 245, 64 L. ed. 887, 11 A. L. R. 519, 40 Sup. Ct. Rep. 550, and applied in a case somewhat like the present by the Supreme Court of Hawaii (*Oahu R. & Land Co.* v. *Pratt,* 14 Haw. 126). Whether this property could be taxed in any other form or not, it cannot be reached as profits or income from leases such as those before us. The same considerations that invalidate a tax upon the leases invalidate a tax upon the profits of the leases; and, stopping short of theoretical possibilities, a tax upon such profits is a direct hamper upon the effort of the United States to make the best terms that it can for its wards. *Western* v. *Charleston,* 2 Pet. 449, 468, 7 L. ed. 481, 488. The taxation of cattle grazing in Indian lands, held valid in *Thomas* v. *Gay,* 169 U. S. 264,

273, 42 L. ed. 710, 714, 18 Sup. Ct. Rep. 340, obviously is more remote."

It is clear under the decision in *Indian Territory Illuminating Oil Co.* v. *Oklahoma, supra,* the leases on restricted Indian land executed pursuant to Act of Congress may not be taxed ad valorem, either by directly assessing the tax upon the leases themselves, or indirectly by including the value thereof in determining the value of the capital stock of a corporation for assessment for ad valorem taxation. It seems equally clear that under the *per curiam* decisions in Howard v. Oil Companies and Large Oil Co. v. Howard that the share of the lessee in the production from the restricted Indian land by virtue of such leases thereon is not subject to ad valorem taxation, because otherwise the gross production tax in lieu of and a just equivalent for a general ad valorem tax thereon in the tax year in which it was produced would have been sustained. It certainly cannot now be questioned that the income from the sale of oil produced under such a lease cannot be taxed by the State, for the reason as stated in the Gillespie case, such a tax is in effect a tax on the lease itself. The lease itself cannot be taxed by the State, for to admit the power to tax it is to admit the power to destroy the power to make it. It was very pertinently observed by this Court that the step is not a long one from the invalidity of a tax on the lease to the invalidity of a tax on the income therefrom. But intermediate the lease and the income derived from

the sale of the oil produced is the oil itself. If the income derived from the *sale* of the oil is immune, the *oil* from which the income is derived must necessarily be immune. The same considerations which invalidate a tax upon the leases and invalidates a tax upon the profits of leases, must necessarily invalidate an ad valorem tax on the oil produced from the lease. It cannot be material whether the thing taxed is the product itself or the proceeds of the sale thereof. A tax on the oil itself, either by way of a gross production tax imposed in lieu of a general ad valorem tax thereon or a direct ad valorem tax, hampers the effort of the United States to make the best terms possible for its wards, fully as much as a tax on the income derived from the sale of the oil. It must be true that if a gross production tax cannot be imposed in lieu of a general ad valorem tax and which is restricted to a just equivalent for a general ad valorem tax, that the oil itself cannot be subjected to a direct general ad valorem tax. It cannot be of any consequence whether the ad valorem tax, or the substitute therefor, be imposed for the tax year in which the oil is produced, or for some subsequent tax year, so long as the oil remains in the hands of the lessee in its original state, awaiting an opportunity to market it. Lessees must in the interests of their lessors, as well as their own, produce the oil from the leased lands to protect against drainage through wells on adjacent premises. When the production from a field exceeds the market outlet, as it did during the

time the oil in question was produced, the lessee has no option but to store it and hold it until a market can be had.

It is not disputed that the 51,630 barrels of crude oil in storage was in fact produced by petitioner from restricted Indian lands under leases executed pursuant to Act of Congress to secure the development of the lands and obtain for the benefit of the restricted Indians a percentage of the gross oil produced. The remainder going to the petitioners as its compensation for the service rendered, of which the oil in question is a part. If this 51,630 barrels of oil had been sold in the year in which it was produced, or in any year subsequent thereto, the State of Oklahoma could not have imposed a tax of any nature upon the proceeds derived from the sale. So much is clear and cannot be disputed. But the oil has not been sold. It is stored in its original state awaiting an opportunity to market it and turn it into money. If the proceeds of sale when ultimately realized cannot be taxed, how can the oil itself be taxed in the meantime? Until sold the oil represents the income of the lessee from the lease, as much so as the proceeds when sold. If it cannot be taxed in its converted form, certainly it cannot in its original form. If a tax of a percentage of the proceeds of sale of the oil, as income, tends to hamper the United States in execution of its obligation to its Indian wards, clearly a tax of a percentage of the value of the oil before sale has a like effect. This Court has so determined. It will be recalled that while the gross production tax laid on lead and

zinc ores, oil and other minerals is in lieu of a general ad valorem tax on the products themselves in the tax year in which they are produced, as well as other property, the act specifically provides that:

> "* * * oil in storage, asphalt and ores bearing minerals hereinbefore named, mined, produced and on hand at the date as of which property is assessed for general and ad valorem taxation for any subsequent tax year shall be assessed and taxed as other property within the taxing district in which such property is situated at the time."

It is under that provision of the statute that the tax authorities of the State sought to list and assess the oil in question in the manner provided in other statutes for assessing property for ad valorem taxation. Under that provision the State tax authorities assessed certain lead and zinc ores of the Jaybird Mining Company produced from the lands of a restricted Indian under a lease executed pursuant to similar congressional authority in the year 1920, and on hand on January 1, 1921, as of which date the property was assessed for the tax year subsequent to that in which the ore was produced. The State Supreme Court held that the property was subject to such assessment for general ad valorem taxation. *Weir* v. *Jaybird Mining Co.*, 104 Okla. 271. The decision was reviewed by this Court on writ of error. *Jaybird Mining Co.* v. *Weir*, 271 U. S. 609. After reviewing the foregoing and other decisions, this Court said:

"In this case the lease was made to secure the de-

velopment of the lands and obtain for the benefit of the restricted Indian owners a percentage of the gross proceeds of the ores to be mined. The ad valorem tax here in controversy was assessed on the ores in mass at the mine before sale, and that was an attempt to tax an agency of the Federal government within the principle of the cases cited."

The State Court in the opinion in the instant case (13 Pac. [2d] 586) cited and undertook to distinguish the decision referred to. In the opinion it was stated:

> "In *Jaybird Mining Co.* v. *Weir, County Treas.*, 271 U. S. 609, 46 S. Ct. 592, 70 L. ed. 1112, there was involved the question of whether an ad valorem tax could be levied upon lead and zinc ore extracted from restricted Indian land and stored in bins on the premises from which the ore had been extracted. This court held that the property was subject to the state ad valorem tax. *Weir, County Treas.* v. *Jaybird Mining Co.*, 104 Okla. 271, 232 Pac. 425. That judgment was reversed by the Supreme Court of the United States in the above-cited case. That court held that the lessee's individual part of the ore was exempt from taxation.
>
> "If the oil sought to be taxed in this case had been stored on the premises from which it had been produced, and if it had not been separated from the portion belonging to the lessor, under the rule stated in the Jaybird case, it would be exempt from ad valorem taxation. That rule is not applicable to the facts in this case, which show that the portion of the oil produced, which belonged to the lessor, had been delivered to the Superintendent of the Five Civilized Tribes for the benefit of the lessor, and that the lessor owned no part of the oil in storage."

In the opinion rendered the same day in another case, in which the same question was involved (*Board of County*

Commissioners of Payne Co. v. *Indian Territory Illuminating Oil Co.*, 14 Pac. [2d] 929, and now pending in this Court as No. 357), the Court adverted to the fact that the oil involved in that case had been removed from the premises where produced and commingled in common storage tanks with other oil of like grade and quality upon which the tax exemption was not claimed.

It is true that the ore involved in the Jaybird Mining case was being held in wooden bins on the leased premises and that the share of the Indian lessor had not been physically segregated, while in this case the oil had been removed from the premises where produced and held in storage in steel tanks, in some of which at least other oil of like grade and quality was stored, and the interest of the lessor had been separated. It is impossible to distinguish the cases in principle, on account of the differences adverted to, any more than because in one case the ores were stored in wooden bins and in the other the oil was stored in steel tanks.

The fact that the lessee had not settled with the Indian lessor for royalties on the ores involved in the Jaybird Mining case at the time of the assessment has no apparent significance. The ores belonged to the mining company, and the State was seeking to assess property belonging to it, and not property belonging to the restricted Indian. The decision by this Court did not turn on the right of the State to tax property of a restricted Indian, or the interest of

such Indian in property, but turned on the power of the State to tax as the property of the lessee the ores mined by it pursuant to the lease. The ores involved in the former case, as well as the oil involved in the present case, was personal property. Neither the ores nor the oil was a part of the realty. It is immaterial whether the land on which they were held in storage, were unrestricted or restricted and hence taxable or not. The question of whether the ores in the former case, or the oils in the instant cases are subject to ad valorem taxation turns upon their source and not the place within the State they may happen to be at the time of the assessment. The fact that property may be commingled with other property of like kind, does not relieve it from any burden imposed by law (*Harrington* v. *United States,* 11 Wall. 356), or deprive it of any exemption or privilege to which it is entitled by law. *First Nat. Bank of Cushing* v. *Funnell,* 144 Okla. 188; *Holmes* v. *Marshall,* 145 Cal. 777, 79 Pac. 534, 104 A. S. R. 86, 91; *State* v. *Northwestern Elevator Co.,* 101 Minn. 192, 112 N. W. 68; *Edgewood Distilling Co.* v. *Rosser's Admr.,* 116 Va. 624, 82 S. E. 716; *Apponoose County* v. *Henke,* 207 Ia. 835, 223 N. W. 876; *Colley* v. *H. L. Edwards Co.,* 258 S. W. 191.

CONCLUSION

It is, therefore, respectfully submitted that this case is one calling for the exercise by this Court of its super-

visory powers, and that if this Court has not jurisdiction to review the decision of the Supreme Court of Oklahoma by appeal, that to such an end a writ of certiorari should be granted, and the decision finally reversed.

JOHN H. MILEY,
Counsel for Petitioner.